8-26-2014

Heilman v. State Respondent's Brief Dckt. 41240

IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS R. HEILMAN, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	No. 41240 Nez Perce Co. Case No. CV-2011-1323

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

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Nature of the Case

Dennis Heilman appeals from the district court's order summarily dismissing his successive petition for post-conviction relief.

Statement of Facts and Course of Proceedings

A jury convicted Heilman of rape, aggravated assault, false imprisonment, and unlawful entry. State v. Heilman, 2011 Unpublished Opinion No. 684, *1 (Ct. App. November 3, 2011). Heilman filed a *pro se* petition for post-conviction relief asserting ineffective assistance of counsel for failing to file a timely appeal, failing to file a Rule 35 motion, and for failing to advise Heilman of his Fifth Amendment right to remain silent during a psychosexual evaluation. Id. The parties stipulated that trial counsel was ineffective for failing to file either a timely appeal or a timely Rule 35 motion, and the district court vacated and reentered the judgment of conviction to allow the timely filing of an appeal and Rule 35 motion. Id. Heilman's conviction and sentence were ultimately affirmed on appeal. State v. Heilman, 2010 Unpublished Opinion No. 741 (Ct. App. December 10, 2010).

The remaining claim of ineffective assistance of counsel regarding the psychosexual evaluation proceeded to an evidentiary hearing, after which the district court found that Heilman had "failed to establish his claim of ineffective assistance of counsel." Id. On appeal, the Court of Appeals affirmed the district court's denial of Heilman's claims, finding Heilman had "failed to meet his burden of showing that his counsel provided ineffective assistance by failing to advise

Heilman of his right to refuse to participate in the PSE and by failing to be present at the PSE and PSI." Id., *5.

Statement of Facts and Course of Successive Post-Conviction Proceedings

Heilman filed a *pro se* successive petition for post-conviction relief in June of 2011. (R., pp.18-26.) In it, Heilman raised 13 separate assertions of ineffective assistance. (Id.) The district court appointed Heilman post-conviction counsel (R., p.35) who filed an amended petition preserving Heilman's previously asserted issues (R., pp.59-62).

The state filed a motion for summary disposition asserting Heilman's petition "present[ed] no genuine issue of material fact." (R., p.66.) The state further argued Heilman's claims were not proper claims pursued under the UPCPA, raised issues previously decided on appeal, or should have been raised in a prior petition for post-conviction relief. (R., p.108.) Following a hearing on the state's motion, the court issued a written decision granting summary disposition. (R., pp.116-131.) Heilman appealed from the final judgment reissued upon stipulation of the parties. (R., pp.132-141.)

ISSUE

Heilman states the issue on appeal as:

> Did the district court err in when it summarily dismissed [Heilman's] Successive Petition for Post-Conviction Relief, and denied [Heilman's] Motion to Reconsider[1]?

(Appellant's brief, p.2.)

The state rephrases the issue on appeal as:

Has Heilman failed to establish that the district court erred by summarily dismissing his successive post-conviction petition?

[1] Although Heilman's statement of issues on appeal indicates the denial of a motion to reconsider, the record does not include such a motion nor does his brief on appeal address it.

ARGUMENT

Heilman Has Failed To Establish That The District Court Erred By Summarily Dismissing His Successive Post-Conviction Petition

A. Introduction

The district court dismissed Heilman's successive petition on the bases asserted by the state in its motion for summary dismissal. (R., p.120, 130.) The state alleged Heilman

> failed to verify his claims with affidavits or evidence, assert[ed] claims that are not valid under the UPCPA, raise[d] issues that were decided on direct appeal, and raise[d] issues that should have been raised in a prior post-conviction petition.

(R., p.120.) On appeal Heilman does not challenge the district court's findings, but rather generally asserts that while "mindful" of the court's rulings below his post-conviction claims were supports by his verified petition and affidavit. (See generally Appellant's brief.) Heilman's arguments on appeal fail.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely

review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Dismissal Of Heilman's Successive Petition For Post-Conviction Relief Was Appropriate

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than "a short and plain statement of the claim" that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 522 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

Idaho Code § 19-4906 authorizes summary disposition of an application for post-conviction relief when the applicant's evidence has raised no genuine issue of material fact, which if resolved in the applicant's favor, would entitle the applicant to the requested relief. Downing v. State, 132 Idaho 861, 863, 979 P.2d 1219, 1221 (Ct. App. 1999); Martinez v. State, 126 Idaho 813, 816, 892

P.2d 488, 491 (Ct. App. 1995). Pursuant to I.C. § 19-4906(c), a district court may dismiss a post-conviction application on the motion of any party when it appears that the applicant is not entitled to relief. Specifically, I.C. § 19-4906(c) provides:

> The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

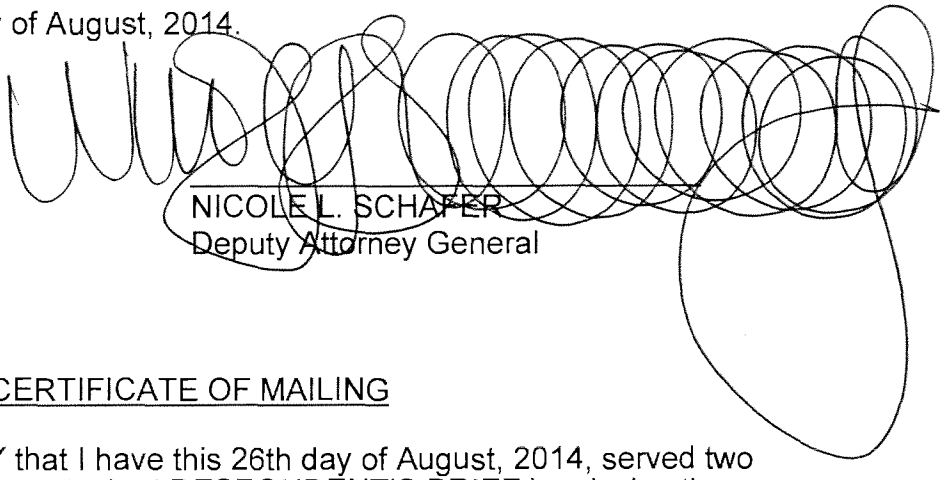
In applying these principles in this case, the district court summarily dismissed Heilman's petition. (R., pp.116-131.) In its opinion and order on motion for summary disposition, the district court articulates the applicable legal standards and sets forth, in detail, the reasons Heilman failed to establish a genuine issue of material fact on any of his claims. The state adopts the district court's written opinion as its argument on appeal, a copy of which is attached hereto as Appendix A. Heilman does not specifically challenge any of the court's findings or legal conclusions (see generally Appellant's Brief), and he has otherwise failed to establish the district court erred in dismissing his petition.

Because Heilman has failed to establish any basis for reversing the district court's dismissal of his successive petition for post-conviction relief or any other basis for relief, the district court's order should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Heilman's successive petition for post-conviction relief.

DATED this 26th day of August, 2014.



NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 26th day of August, 2014, served two true and correct copies of the attached RESPONDENT'S BRIEF by placing the copies in the United States mail, postage prepaid, addressed to:

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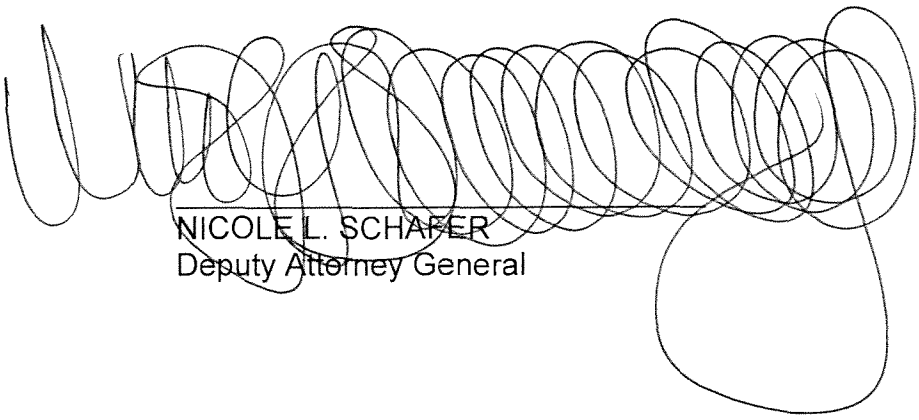

NICOLE L. SCHAFER
Deputy Attorney General

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APPENDIX A

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PATTY O. WEEKS
CLERK OF THE DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

DENNIS R. HEILMAN, Petitioner, v. STATE OF IDAHO, Respondent.	**CASE NO.** CV 2011-1323 **OPINION AND ORDER ON MOTION FOR SUMMARY DISPOSITION**

This matter came on before the Court on the State's Motion for Summary Disposition. The Petitioner was represented by Danny Radakovich, attorney at law. The State was represented by Nance Ceccarelli, Nez Perce County Deputy Prosecuting Attorney. The Petition for Post-Conviction Relief was originally submitted by the Petitioner, Dennis Heilman, with amended briefing filed by counsel. Oral argument was heard on October 18, 2012. The Court, being fully advised in the matter, hereby renders its decision.

BACKGROUND

Following a trial by jury, Dennis Heilman was found guilty on June 30, 2006, of committing the crimes of rape, aggravated assault, false imprisonment, and unlawful

entry. Judgment of conviction on these crimes was entered on September 28, 2006. The matter was appealed and an unpublished opinion was issued by the Court of Appeals of the State of Idaho on December 10, 2010.

Heilman has previously petitioned this Court for post-conviction relief. *See Nez Perce County case CV-2008-1590.*[1] In the 2008 case, there were three issues before the Court: whether trial counsel was ineffective for failing to file a Rule 35 motion for reduction of sentence; whether counsel was ineffective for failing to timely file an appeal; and whether counsel was ineffective by failing to advise the Petitioner of his Fifth Amendment right to remain silent during a court ordered psychosexual evaluation. The parties agreed that filing an amended judgment of conviction would allow the Petitioner to both file a Rule 35 motion and timely file for appeal; thus, the first two issues were resolved. An evidentiary hearing was held on the third issue. Following the evidentiary hearing, this Court determined that the Petitioner failed to establish trial counsel was ineffective with respect to the advice given regarding the psychosexual evaluation.

The Court of Appeals considered several issues regarding the underlying criminal action. Ultimately, the judgments of conviction and sentences for aggravated assault and rape were affirmed. *See State v. Heilman, 2010 Unpublished Opinion No. 741, Docket No. 36554 (Ct. App., December 10, 2010).*

Currently pending before this Court is the Petitioner's most recent Petition for Post-Conviction Relief. The State has filed a motion for summary disposition of the petition.

[1] This Court takes judicial notice of the underlying criminal case, Nez Perce County case CR-2005-0011176, and also the previous civil case seeking post-conviction relief, *CV-2008-1590.*

POST-CONVICTION RELIEF STANDARD

Under the Uniform Post-Conviction Procedure Act, a person sentenced for a crime may seek relief upon making one of the following claims:

> (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
> (2) That the court was without jurisdiction to impose sentence;
> (3) That the sentence exceeds the maximum authorized by law;
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
> (6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
> (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.

I.C. § 19-4901(a).

A petition for post conviction relief "may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." I.C. § 19-4902(a)

Petitions for post-conviction relief are a special proceeding distinct from the criminal action that led to the petitioner's conviction. *Sanchez v. State*, 127 Idaho 709, 711, 905 P.2d 642 (Ct. App.1995). "An application for post-conviction relief initiates a proceeding which is civil in nature." *Fenstermaker v. State*, 128 Idaho 285, 287, 912 P.2d 653, 655 (Ct. App.1995). However, unlike an ordinary civil action that requires only a short and plain statement of the claim, an application for post-conviction relief "must be verified with respect to facts within the personal knowledge of the applicant,

and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the petition. I.C. § 19-4903." *Id.*

In a proceeding for post-conviction relief, the petitioner bears the burden of pleading and proof imposed upon a civil plaintiff. "Thus, an applicant must allege, and then prove by a preponderance of the evidence, the facts necessary to establish his claim for relief." *Martinez v. State*, 125 Idaho 844, 846, 875 P.2d 941 (Ct. App.1994).

Under I.C. § 19-4906, summary disposition of a petition for post-conviction relief may occur upon motion of a party or upon the court's own initiative. However, "[s]ummary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the petitioner to the requested relief." *Fenstermaker*, 128 Idaho at 287, 912 P.2d at 655. "If the application raises material issues of fact, the district court must conduct an evidentiary hearing and make specific findings of fact on each issue." *Sanchez* at 711. "It is also the rule that a conclusory allegation, unsubstantiated by any fact, is insufficient to entitle a petitioner to an evidentiary hearing." *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369 (Ct.App.1986).

DISCUSSION

The petition before this Court has been appropriately filed pursuant to the Uniform Post-Conviction Procedures Act (hereafter "UPCPA")[2]. "[T]he UPCPA was instituted as the exclusive vehicle to present claims regarding whether a conviction or

[2] The Petitioner's claims do not fall under the constitutional remedy of habeas corpus. "A writ of habeas corpus, on the other hand, is the appropriate method for challenging unlawful conditions of confinement." *Id.*; *Olds v. State*, 122 Idaho 976, 979, 842 P.2d 312, 315 (Ct. App. 1992). The distinction between a petition for post-conviction relief and a writ of habeas corpus is important because the constitutional remedy of habeas corpus has no time limitation. *Id.*

sentence was entered in violation of constitutional or statutory law." *Eubank v. State*, 130 Idaho 861, 863, 949 P.2d 1068, 1070 (Ct. App. 1997); *Still v. State*, 95 Idaho 766, 768, 519 P.2d 435, 437 (1974). As discussed above, the UPCPA limits the time that a petitioner may submit a petition. I.C. § 19-4902(a) states: "An application may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." I.C. § 19-4902(a). This petition was filed on June 30, 2011, well within the one year time frame contemplated by the UPCPA.

The original petition sets forth thirteen assertions of ineffective assistance of counsel. An Amended Petition was filed on June 6, 2012. The State's motion for summary disposition asserts that the petition should be summarily dismissed because the Petitioner failed to verify his claims with affidavits or evidence, asserts claims that are not valid under the UPCPA, raises issues that were decided on direct appeal, and raises issues that should have been raised in a prior post-conviction petition. Each of these claims will be addressed individually.[3]

1. **Whether trial counsel was ineffective for failing to object to the prosecutor misstating the elements of the crime of rape at trial.**

The Petitioner asserts that counsel was ineffective for failing to object to the prosecutor's misstatement of the elements of the crime of rape at the trial. The Petitioner contends that a different result in the rape case could have resulted. The Petitioner fails to support this claim with affidavits, records, or other evidence. Conclusory allegations,

[3] The motion for summary disposition does not individually address each claim, but instead sets forth the general basis upon which the case should be summarily dismissed. In order to ensure each of Petitioner's claims are considered, this Court will address each individually, as they are set forth in the Amended Petition for Post-Conviction Relief.

unsubstantiated by fact, are insufficient to entitle the petitioner to an evidentiary hearing. I.C. § 19-4903. Substantiation of allegations is discussed in detail in *King v. State*, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

> The standard for dismissal under I.C. § 19–4906(b) states: "Disposition on the pleadings and record is not proper if there exists a material issue of fact." King correctly asserts that allegations in an application for post-conviction relief must be deemed to be true until those allegations are in some manner controverted by the state. *Baruth v. Gardner,* 110 Idaho 156, 715 P.2d 369 (Ct.App.1986), *citing Tramel v. State,* 92 Idaho 643, 448 P.2d 649 (1968). However, in *Baruth,* we further held that:
>
> > It is also the rule that a conclusory allegation, unsubstantiated by any fact, is insufficient to entitle a petitioner to an evidentiary hearing. *Smith v. State,* 94 Idaho 469, 491 P.2d 733 (1971); *Drapeau v. State,* 103 Idaho 612, 651 P.2d 546 (Ct.App.1982). Idaho Code § 19–4903 states that "[a]ffidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached."
>
> 110 Idaho at 159, 715 P.2d at 372.
>
> There were no affidavits, records or other evidence offered either with King's second application or with his "Traverse", other than an affidavit by King outlining the factual circumstances of the commission of the rape and expressing dissatisfaction because of lesser penalties meted out to co-defendants on the rape charge. The conclusory allegations offered by King were not substantiated as required by the statute.

Id. at 445-446, 757 P.2d at 708-709.

In addition, the Petitioner fails to meet the standards set forth in *Strickland v. Washington* for purposes of determining whether counsel was ineffective. The Idaho Supreme Court discussed claims of ineffective assistance of counsel within petitions for post-conviction relief in *Saykhamchone v. State*, 127 Idaho 319, 900 P.2d 795 (1995).

> In order to warrant a hearing for a petition for post-conviction relief based on a claim of ineffective assistance of counsel, a claimant must first show that a material issue of fact exists as to whether counsel's performance was deficient. Second, a claimant must show that a material issue of fact exists as to whether this deficient performance prejudiced his case.

> To establish deficient performance, a defendant must show that 'counsel's representation fell below an objective standard of reasonableness.' *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2064 [80 L.Ed.2d 674] (1984). To prove prejudice requires a showing that '[t]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068.

Id. at 323, 900 P.2d at 799 (internal citations omitted). Nothing in the record before this Court supports an argument that counsel's representation fell below an objective standard of reasonableness. Nor is there an indication that such an objection would have changed the outcome of this case. Further, the jury was instructed regarding the role of the judge and the jury in this case. This instruction is set forth in ICJI 201:

> You have now heard all the evidence in the case. My duty is to instruct you as to the law.
>
> You must follow all the rules as I explain them to you. You may not follow some and ignore others. Even if you disagree or don't understand the reasons for some of the rules, you are bound to follow them. If anyone states a rule of law different from any I tell you, it is my instruction that you must follow.

Thus, the jury was correctly informed regarding the elements of rape in this case. Even if counsel had objected to the prosecutor's presentation of the elements, there is nothing to indicate the results of this case would have been different.

2. Whether counsel was ineffective for failing to have an expert witness available to address witness perjury involving testimony about marijuana use versus results of a urinalysis.

The Petitioner asserts counsel was ineffective for failing to call an expert witness with respect to this issue. A similar issue was addressed in *Self v. State*, 145 Idaho 578, 181 P.3d 504 (Ct. App. 2007).

> Therefore, the district court summarily dismissed Self's application because it did not contain information as to why an expert witness would have been helpful and what the expert would have testified to.

> Under the second prong of the *Strickland* test for ineffective assistance of counsel, a showing of prejudice requires more than mere speculation about what an expert witness may have said if trial counsel employed them. *Raudebaugh v. State,* 135 Idaho 602, 605, 21 P.3d 924, 927 (2001). In *Raudebaugh,* the defendant argued that the district court erred by not releasing the murder weapon so that he could get it examined before summarily dismissing his application for post-conviction relief. On appeal, the Idaho Supreme Court concluded that Raudebaugh failed to demonstrate how his case was prejudiced because he did not show that the state's testing was flawed or that there was a new technology that would make current testing more reliable. Raudebaugh only offered conclusory speculation as to what an expert may have said after examining the murder weapon. Therefore, the Court concluded that summary dismissal was appropriate because Raudebaugh did not make a sufficient showing that the failure of trial counsel to hire an independent expert actually prejudiced his case.

Id. at 580-581, 181 P.3d at 506-507. The Petitioner faces similar circumstances in this case. There is only a mere speculative statement that an expert may have been able to testify regarding urinalysis, but there is nothing to establish that this testimony would ultimately lead to a different result in this case. Further, the decision of what witnesses to call is generally a tactical decision. In *State v. Payne*, 146 Idaho 548, 199 P.3d 123 (2008), the Idaho Supreme Court discussed trial counsel's determination of witnesses to call at trial.

> The decision of what witnesses to call "is an area where we will not second guess counsel without evidence of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." *State v. Larkin,* 102 Idaho 231, 234, 628 P.2d 1065, 1068 (1981); *Bagshaw v. State,* 142 Idaho 34, 38, 121 P.3d 965, 969 (Ct.App.2005) ("It is generally agreed that the decision of what evidence should be introduced at trial is considered strategic or tactical.") (citing American Bar Association Standards for Criminal Justice 4-5.2). Here, Payne has provided no evidence which suggests that this decision resulted from inadequate preparation, ignorance or other shortcomings. Therefore, the presumption that counsel's performance fell within the acceptable range of professional assistance leads the Court to conclude that failing to introduce expert legal testimony did not fall below an objective standard of reasonableness.

Id. at 563, 199 P.3d at 138. Thus, based upon the record presented to the Court, this claim is summarily dismissed.

3. Whether counsel was ineffective for failing to question Penny Heilman regarding inconsistencies in statements.

Similar to claim number 2, this claim fails to set forth how presenting such testimony would have resulted in a different outcome in this case. *See Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 2064 [80 L.Ed.2d 674] (1984). Further, this falls into the category of decisions which are considered strategic or tactical. Nothing in the record before this Court establishes that counsel's decisions on his cross-examination of Penny Heilman resulted from inadequate preparation, ignorance or other shortcomings. Therefore, this claim is summarily dismissed.

4. Whether counsel was ineffective for failing to request instructions regarding exhibition or use of a deadly weapon as lesser included offenses and for failing to request an instruction based on I.C.§ 18-6107.

Next, the Petitioner contends counsel was ineffective for failing to request instructions regarding exhibition or use of a deadly weapon as a lesser included offense, and for failing to request an instruction based on I.C. §18-6107. Exhibition or use of a deadly weapon may be an included offense of aggravated assault. "[T]he correctness of the jury instructions are issues which could have been raised on direct appeal, but were not, and are, therefore, forfeited and not to be considered in post-conviction proceedings. I.C. § 19-4901." *Cootz v. State,* 129 Idaho 360, 364, 924 P.2d 622, 626 (Ct. App. 1996). Whether counsel was ineffective for failing to object to instructions, or request instructions is a matter which can be considered in post-conviction proceedings. *See McKay v. State*, 145 Idaho 567, 570, 225 P.3d 700, 702 (2010). However, in the case at hand, the Petitioner has failed to set forth any facts or evidence to support his claim that

counsel was ineffective. Conclusory allegations, unsubstantiated by fact, are insufficient to entitle the petitioner to an evidentiary hearing. I.C. § 19-4903; *King v. State*, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

In addition, the Petitioner fails to set forth any evidence or facts to support his argument that counsel was ineffective for failing to request an instruction based on I.C. § 18-6107. This statute pertains to rape of a spouse. At the time of trial, this statute stated "No person shall be convicted of rape for any act or acts with that person's spouse, except under the circumstances cited in paragraphs 3. and 4. of section 18-6101, Idaho Code." I.C. § 18-6107. The Petitioner was convicted of rape pursuant to I.C. §18-6101(3), thus, the statute in question provided no defense or immunity to the Petitioner at trial. Based upon the record in this case, the Petitioner fails to establish that counsel was ineffective for failing to request this instruction.

5. Whether counsel was ineffective for failing to object to the Court's instruction No. 13.

The Petitioner contends counsel was ineffective for failing to object to Instruction No. 13, which states "Although PENNY HEILMAN must have resisted the act of penetration, the amount of resistance need only be such as would show the victim's lack of consent to the act." *Nez Perce County Case, CR-2005-011176, Jury Instructions*. This instruction is identical to ICJI 904, which was the pattern jury instruction available at the time of trial, as well as in the present. Again, the Petitioner has failed to set forth any facts or evidence to support his claim that counsel was ineffective. Conclusory allegations, unsubstantiated by fact, are insufficient to entitle the petitioner to an evidentiary hearing. I.C. § 19-4903; *King v. State*, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

In addition, appellate review of this case discussed the application of ICJI 904, and whether the evidence was sufficient to support the jury's finding. The Court of Appeals discussed the comment to ICJI 904, which discussed the requirement to establish resistance to rape. *See State v. Neil*, 13 Idaho 539, 90 P. 860 (1907); *State v. Gossett*, 119 Idaho 581, 808 P.2d 1326 (Ct. App. 1991). Based upon the record in this case, there is nothing to support the Petitioner's contention that had counsel objected to this instruction, it would not have been given to the jury. Therefore, the Petitioner cannot establish that counsel was ineffective for electing to not object to this instruction.

6. Whether counsel was ineffective for failing to point out to the jury inconsistent testimony with respect to the picture of the gun holster.

The Petitioner asserts counsel was ineffective for failing to point out to the jury that the picture of a gun holster sitting in the basement was inconsistent with other testimony, including the fact that Penny Heilman stated the pistol was pointed at her, not in the holster and that the defendant was clad only in briefs with no belt. The Petitioner's argument is simply a conclusory allegation, unsubstantiated by fact. Thus, it is insufficient to entitle the petitioner to an evidentiary hearing. I.C. § 19-4903; *King v. State*, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988). Further, even accepting this allegation as true, the Petitioner fails to establish prejudice as required by *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Therefore, this claim is summarily dismissed.

7. Whether appellate counsel was ineffective for failing to argue trial counsel was ineffective for failing to advise his client with respect to his Fifth Amendment Rights with respect to the psychosexual evaluation.

The Petitioner was afforded an evidentiary hearing on issues regarding his Fifth Amendment Rights with respect to the psychosexual evaluation in Nez Perce County

Case CV-2008-1590. This issue addresses the same matters, and thus, is summarily dismissed.

8. **Whether appellate counsel was ineffective for failing to include issues which were in the original notice of appeal.**

The issue of whether appellate counsel is ineffective for failing to include issues on appeal was discussed in detail in *Mintun v. State,* 144 Idaho 656, 168 P.3d 40 (Ct. App. 2007).

> Mintun's claims that he was denied the effective assistance of counsel because appointed counsel should have raised certain additional issues on appeal are subject to the standards set forth in *Strickland,* and Mintun therefore must show that appellate counsel's performance was deficient and caused prejudice in the outcome of the appeal. *Bell,* 535 U.S. at 697–98, 122 S.Ct. at 1851–52, 152 L.Ed.2d at 928–29; *Sparks v. State,* 140 Idaho 292, 297, 92 P.3d 542, 547 (Ct.App.2004). An indigent defendant does not have a constitutional right to compel appointed appellate counsel to press all nonfrivolous arguments that the defendant wishes to pursue. *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993 (1983). Rather, the process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being the evidence of incompetence, is the hallmark of effective appellate advocacy. *Smith v. Murray,* 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434, 445 (1986). "Notwithstanding *Barnes,* it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins,* 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756, 781 (2000). "[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Id.* (quoting *Gray v. Greer,* 800 F.2d 644, 646 (7th Cir.1986)).

Id. at 661, 168 P.3d at 45. The Petitioner fails to set forth evidence that counsel was incompetent for failing to raise on appeal issues regarding the subpoena of a juror, denial of the defense motion for a new trial, and information pertaining to the victim's employment background. It is clear from the record before this Court that appellate counsel raised several issues on appeal, and that none of the purportedly ignored issues were stronger than those presented. Based upon the record, the Petitioner cannot

overcome the presumption of effective assistance of appellate counsel regarding the issues presented on appeal.

9. **Whether appellate counsel was ineffective for failing to raise issues including testimony regarding the defendant and victim's divorce, and failing to file a reply brief on appeal.**

On this claim, the Petitioner has failed to set forth evidence which would establish that but for appellate counsel's error; the results of his case would have been different. This claim is a conclusory allegation, unsupported by facts sufficient to establish that the Petitioner is entitled to an evidentiary hearing. An indigent defendant does not have a constitutional right to compel appointed appellate counsel to press all nonfrivolous arguments that the defendant wishes to pursue. *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993 (1983). The Petitioner has not set forth a material issue of fact, thus summary dismissal is appropriate.

10. Issues regarding speedy trial.

The UPCPA is not a substitute method to appeal issues which could have been raised on direct appeal.

> This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction. Any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings, unless it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier.

I.C. § 19-4901. The Petitioner has failed to provide a substantial factual showing by affidavit, deposition or otherwise, that he did not receive a speedy trial, or in the alternative, that he did not waive his right to a speedy trial. The Petitioner was arraigned

in the underlying criminal matter on January 12, 2006. The jury trial commenced on June 26, 2006. Nothing in the file indicates that the Petitioners right to a speedy trial was violated. Thus, this claim is summarily dismissed.

11. Whether trial counsel was ineffective for failing to poll the jury.

As stated above, in order to prevail on a claim of ineffective assistance of trial, both prongs of the *Strickland* test must be met. With respect to this claim, the Petitioner fails to provide any facts which suggest that polling the jury would have resulted in a different outcome in this case. This claim is also summarily dismissed.

12. Whether counsel was ineffective for failing to appeal the denial of a motion for a new trial.

The Petitioner fails to establish that an appeal of this issue would have changed the outcome in this case. On appeal, the Defendant's judgments of conviction were affirmed by the Court of Appeals. There is nothing in the record to indicate that this issue could have been successfully appealed.[4] Thus, the Petitioner has failed to show how he was prejudiced by appellate counsel's failure to appeal this motion.

CONCLUSION

Based on the foregoing analysis, the State's motion for summary disposition is granted.

[4] Other courts have considered whether trial counsel was ineffective for failing to file a Rule 35 motion. *See Menchaca v. State*, 128 Idaho 649, 917 P.2d 806 (Ct. App. 1996). While this case is not directly on point, the result is similar. Nothing in the record supports a determination that an appeal of the Court's ruling on the Rule 35 motion would have resulted in a new trial. The motion was simply for leniency, and well within the discretion of the trial court.

ORDER

The State's Motion for Summary Disposition is hereby GRANTED.

IT IS SO ORDERED.

DATED this 28th day of November 2012.

CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION AND ORDER ON MOTION FOR SUMMARY DISPOSITION was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 28th day of November, 2012, on:

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PATTY O. WEEKS, CLERK

By _____
Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY • STATE OF IDAHO EX-OFFICIO RECORDER AND AUDITOR